

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

	)	Case No. C 13-5304 SC
	)	
WEBOOST MEDIA S.R.L.,	)	ORDER GRANTING IN PART AND
	)	DENYING IN PART MOTION TO
Plaintiff,	)	DISMISS, AND DENYING MOTION FOR
	)	<u>PARTIAL SUMMARY JUDGMENT</u>
v.	)	
	)	
LOOKSMART LTD. and DOES 1-100,	)	
	)	
Defendants.	)	

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**I. INTRODUCTION**

Now before the Court are Defendant LookSmart Ltd.'s ("Defendant") combined motions to dismiss Plaintiff WeBoost Media S.R.L.'s first amended complaint under Federal Rule of Civil Procedure 12(b)(6) and for partial summary judgment under Rule 56. ECF Nos. 17 ("FAC"), 24 ("Mot."). The motions are fully briefed. ECF Nos. 25 ("Opp'n"), 26 ("Reply"). The Court finds them appropriate for decision without oral argument. Civ. L.R. 7-1(b). As explained below, Defendant's motion to dismiss is GRANTED in part and DENIED in part, and its motion for partial summary judgment is DENIED.

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1 **II. BACKGROUND**

2 **A. The Parties and the Pay-Per-Click Ad Industry**

3 Defendant acts as an intermediary between online "publishers,"  
4 which provide content from which they hope to generate ad revenue,  
5 and "advertisers," which pay to place ads for goods or services on  
6 publishers' websites. FAC ¶ 7. Intermediaries like Defendant help  
7 advertisers place ads on publishers' websites, in exchange for a  
8 fee. See id.

9 The online advertising model relevant to this case is called  
10 "pay-per-click." Id. In this model, advertisers place their ads  
11 on publishers' websites and are charged a fixed sum each time a  
12 user clicks the ad. Id. ¶ 9. Part of this "pay-per-click" fee is  
13 then paid to the publisher on whose website the ad appeared, and  
14 part goes to the intermediary that helped to place the ad. Id.

15 Plaintiff owns and operates an international network of  
16 websites. Id. ¶ 11. In the online advertising ecosystem,  
17 Plaintiff is primarily a publisher, and its primary source of  
18 income is the revenue generated through the placement of ads on its  
19 websites. Id. Plaintiff entered a contract with Defendant under  
20 which Defendant would act as both intermediary and publisher. Id.  
21 ¶ 17. Defendant, like Plaintiff, owns a network of websites, and  
22 as part of the contract, it agreed to display ads promoting  
23 Plaintiff's website network on its own websites. Id. Plaintiff  
24 agreed to pay Defendant based on the total number of clicks on  
25 those ads, based on Defendant's monthly invoices listing the number  
26 of clicks and the total amount owed. Id. The price per click  
27 varied depending on the market, but it ranged between \$0.01 and  
28 \$0.05. Id.

1        Though it is not a party to this lawsuit, Google and its  
2 businesses are highly relevant to this case. Google is the biggest  
3 intermediary in the pay-per-click advertising market. Id. ¶ 10.  
4 In this capacity it operates a service called Google AdSense. Id.  
5 Plaintiff was a Google AdSense customer. Id. ¶ 12. Google was  
6 Plaintiff's most important intermediary partner before Plaintiff  
7 contracted with Defendant. Id. As part of that contractual  
8 arrangement, Plaintiff acted as a publisher, using Google to locate  
9 and place appropriate online ads on Plaintiff's network of  
10 websites. Id. Under its contract with Google, Plaintiff received  
11 51 to 68 percent of pay-per-click revenue generated from clicks on  
12 the AdSense ads that Google placed on Plaintiff's websites. Id.  
13 Google took the remainder, though it was also permitted by contract  
14 to deduct more money from Plaintiff's AdSense account if it  
15 determined that ad clicks originating from Plaintiff's websites  
16 were illegitimate. Id. These illegitimate clicks are called  
17 "click fraud" in the online ad industry. Id.

18        "Click fraud" is when a person or computer program clicks on  
19 an online ad solely to generate the fees resulting from pay-per-  
20 click advertising models -- not to view the ad's underlying  
21 content. Id. Advertisers get no benefit from this behavior, since  
22 the fraudulent clicker does not engage with whatever the advertiser  
23 is offering (e.g., the perpetrator of click fraud does not buy the  
24 product advertised), but the publishers and intermediaries still  
25 get paid per click. Id. Click fraud is a risk for online  
26 advertising publishers because, as Defendant noted in a recent 10-K  
27 filing, publishers on whose sites click fraud is perpetrated must  
28 sometimes issue credits or refunds to advertisers or pay revenue

1 share to distribution network partners. Id. ¶ 14. This hurts the  
2 publishers' profitability and branding. Id.

3 As Defendant stated in that 10-K, it had previously been  
4 subject to advertiser complaints and litigation regarding click  
5 fraud, and it anticipated continuing to respond to such behavior.  
6 Id. Some small percentage of click fraud is considered unavoidable  
7 and is tolerated within the pay-per-click ad industry, though  
8 Plaintiff states that prior to its agreement with Defendant, its  
9 monthly deductions for pay-per-click traffic that Google considered  
10 illegitimate averaged less than .5 percent of the total pay-per-  
11 click traffic generated on Plaintiff's websites. Id. ¶ 16.

12 Plaintiff entered the contract with Defendant around October  
13 31, 2011. Id. ¶ 17. As part of this contract, Plaintiff signed  
14 Defendant's standard "Terms and Conditions" ("T&C"). ECF No. 1 Ex.  
15 A ("Compl.") Ex. A (also called the "Agreement"). Between December  
16 2011 and June 2012, Plaintiff paid Defendant \$105,273.92, pursuant  
17 to seven invoices. Id. ¶ 18. Throughout this time, Plaintiff  
18 believed it was paying Defendant for legitimate pay-per-click  
19 traffic, not for fraudulent clicks. Id.

20 However, around May 2012, Plaintiff became aware that a  
21 "significant portion" of the clicks for which Defendant was billing  
22 were being identified by Google as click fraud. Id. ¶ 19. Between  
23 April and July 2012, Google deducted nearly \$250,000 from  
24 Plaintiff's AdSense account due to suspicious click fraud activity,  
25 substantially all of which came to Plaintiff's websites from  
26 websites affiliated with Defendant. Id. Then, around July 3,  
27 2012, Google informed Plaintiff that an additional \$191,000 in  
28 gross revenue (the amount prior to Google taking its share) was

1 being deducted from Plaintiff's AdSense account due to click fraud  
2 originating on Plaintiff's website www.pay-it-less.co.uk. Id. ¶  
3 20. This deduction led to a loss of \$130,000 for Plaintiff. Id.  
4 Between August and December 2012, Google deducted an additional  
5 \$12,500 from Plaintiff's AdSense account as additional compensation  
6 for the unusually high volume of click-fraud traffic originating  
7 from Plaintiff's websites, substantially all of which Plaintiff  
8 maintains was traceable to Defendant's websites or conduct. Id. ¶  
9 23.

10 Eventually, Plaintiff's AdSense account was reduced to a  
11 negative balance, and in December 2012, Plaintiff abandoned the  
12 account. Id. ¶ 26. Plaintiff's business relationship with Google  
13 deteriorated, leading it to use less profitable pay-per-click  
14 intermediary alternatives, and only recently has Plaintiff begun to  
15 repair its relationship with Google, though its previous levels of  
16 usage and profit have yet to return. Id. ¶ 27.

17 **B. Procedural History and Plaintiff's New Allegations**

18 Based on the facts described above, Plaintiff asserted the  
19 following causes of action against Defendant: (1) breach of  
20 contract, (2) breach of the covenant of good faith and fair  
21 dealing, (3) fraudulent concealment, (4-5) negligent and  
22 intentional interference with prospective economic advantage, (6)  
23 intentional interference with contractual relations, and (7)  
24 violation of California's Unfair Competition Law, Cal. Bus. & Prof.  
25 Code § 17200 et seq. Defendant conceded the first cause of action,  
26 but argued that Plaintiff is still subject to the T&C's limitation  
27 of liability for every claim. Defendant moved to dismiss all of  
28 Plaintiff's claims except the conceded breach of contract claims,

1 arguing in part that California's economic loss doctrine (discussed  
2 in more legal detail below) barred tort claims that were merely  
3 breach of contract claims in disguise.

4 The Court agreed, since Plaintiff's tort claims as pled did  
5 not rest on any allegations or duties independent of Plaintiff's  
6 contract claim. The Court held those claims barred by the economic  
7 loss doctrine.<sup>1</sup> The Court also agreed that, absent tort liability  
8 that could trigger a legal exception to the limitation on liability  
9 clause, Plaintiff's damages were limited by the T&C to direct  
10 damages based on Plaintiff's contractual payments. The Court gave  
11 Plaintiff leave to amend its complaint to explain how its tort  
12 claims could avoid the economic loss rule's bar, which could  
13 potentially effect the T&C's limitation of liability clause.

14 Plaintiff's FAC now provides more detail to the original  
15 complaint's allegation that "substantially all" of the traffic that  
16 Google identified as click fraud was associated with Defendant's  
17 websites. The Court noted in the February 28 Order that the  
18 circumstances of this allegation were unclear. See ECF No. 16  
19 ("Feb. 28 Order") at 4 n.1. Plaintiff's FAC now alleges in some  
20 detail that Defendant actually created a series of "bogus websites"  
21 that were, in truth, "nothing more than decoys, designed to provide  
22 cover for [Defendant's] fraudulent activities." FAC ¶¶ 21-23.  
23 According to Plaintiff, most of these websites actually contained  
24 "duplicative content appearing to advertise bogus companies," like  
25 purportedly fake asset management companies. Id. ¶ 26. Some of  
26 the websites apparently contained nothing but non-functional

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27 <sup>1</sup> The Court held that both Plaintiff's breach of contract and  
28 breach of the implied covenant claims survived, treating the latter  
as a contract claim. Feb. 28 Order at 12.

1 "search engines," with no advertisements shown. Id. ¶¶ 25-28.

2 Plaintiff alleges, further, that Defendant itself "initiated  
3 automated software processes designed to make it appear as if  
4 legitimate on-line consumers were visiting these bogus websites"  
5 and then clicking ads, for which Defendant would charge Plaintiff.  
6 Id. ¶ 24. The point of Plaintiff's new allegations, compared to  
7 the original complaint, is that Defendant did not just allow  
8 Plaintiff to be billed for click fraud. Rather, Defendant  
9 engineered the click fraud itself, so that it could charge  
10 Plaintiff more money and potentially disrupt Plaintiff's  
11 arrangement with Google by allowing its automated processes to  
12 proceed from Defendant's properties to Plaintiff's, where they  
13 generated clicks on Plaintiff's Google ads. Even so, Plaintiff  
14 also asserts that to the extent that Defendant itself is not  
15 responsible for generating all or part of the fraudulent traffic,  
16 it should have taken steps to detect fraudulent traffic and notify  
17 Plaintiff of it in a timely way. Id. ¶ 32.

18 Based on these facts, Plaintiff asserts its seven causes of  
19 action anew. It contends that its tort claims are based on duties  
20 that arose independently of those created by contract, thereby  
21 avoiding the economic loss rule: (1) breach of contract, (2) breach  
22 of the covenant of good faith and fair dealing, (3) fraudulent  
23 concealment, (4-5) negligent and intentional interference with  
24 prospective economic advantage, (6) intentional interference with  
25 contractual relations, and (7) violation of California's Unfair  
26 Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq.

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1 **III. LEGAL STANDARD**

2 **A. Motion to Dismiss**

3 A motion to dismiss under Federal Rule of Civil Procedure  
4 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.  
5 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based  
6 on the lack of a cognizable legal theory or the absence of  
7 sufficient facts alleged under a cognizable legal theory."  
8 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
9 1988). "When there are well-pleaded factual allegations, a court  
10 should assume their veracity and then determine whether they  
11 plausibly give rise to an entitlement to relief." Ashcroft v.  
12 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court  
13 must accept as true all of the allegations contained in a complaint  
14 is inapplicable to legal conclusions. Threadbare recitals of the  
15 elements of a cause of action, supported by mere conclusory  
16 statements, do not suffice." Id. (citing Bell Atl. Corp. v.  
17 Twombly, 550 U.S. 544, 555 (2007)).

18 Claims sounding in fraud are subject to the heightened  
19 pleading requirements of Federal Rule of Civil Procedure 9(b),  
20 which requires that a plaintiff alleging fraud "must state with  
21 particularity the circumstances constituting fraud." See Kearns v.  
22 Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009). "To satisfy  
23 Rule 9(b), a pleading must identify the who, what, when, where, and  
24 how of the misconduct charged, as well as what is false or  
25 misleading about [the purportedly fraudulent] statement, and why it  
26 is false." United States ex rel Cafasso v. Gen. Dynamics C4 Sys.,  
27 Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (quotation marks and  
28 citations omitted).



**B. Summary Judgment**

Entry of summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment should be granted if the evidence would require a directed verdict for the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). The moving party bears the initial burdens of production and persuasion. Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc., 210 F.3d 1099, 1102 (9th Cir. 2000).

**IV. DISCUSSION****A. Contradictions in Plaintiff's FAC**

As a preliminary matter, Plaintiff asserts in an apparent contradiction that "the bogus websites never actually displayed advertising links to [Plaintiff's] sites," even though Plaintiff's claims are based on Defendant charging it for allegedly fraudulent clicks on Plaintiff's advertisements. Compare FAC ¶ 25 (stating that none of Defendant's fraudulent websites displayed Plaintiff's ads), with FAC ¶ 17 (affirming that the parties agreed to show Plaintiff's ads on Defendant's sites, and Plaintiff would pay Defendant for each click on Plaintiff's ads).

However, drawing all reasonable inferences in Plaintiff's favor, Murphy v. Schneider Nat'l, 362 F.3d 1133, 1138 (9th Cir. 2004), the Court finds that Plaintiff must mean that at least some of Defendant's allegedly fraudulent clicks were not directed through Plaintiff's ads on Defendant's sites, but were nevertheless directed through Defendant-owned properties and billed to Plaintiff

1 as clicks under the T&C. The invoices Plaintiff provides, for  
2 example, leave no doubt that Defendant actually invoiced Plaintiff  
3 for clicks, and that Plaintiff allegedly paid. The technical  
4 question of how Defendant generated, counted, or directed those  
5 clicks is less clear from the pleadings, but the Court is able to  
6 infer from Plaintiff's allegations and incorporated evidence that  
7 Plaintiff's allegations on these points are plausible. Neither  
8 party addresses these apparent inconsistencies at this stage, but  
9 discovery could clarify matters.

10 **B. The Economic Loss Rule**

11 Defendant's sole argument in favor of dismissal is that the  
12 economic loss rule bars Plaintiff's tort claims because they are  
13 not independent of Plaintiff's breach of contract claims. Reply at  
14 1.

15 The economic loss rule, in summary, "is that no tort cause of  
16 action will lie where the breach of duty is nothing more than a  
17 violation of a promise which undermines the expectations of the  
18 parties to an agreement." Oracle USA, Inc. v. XL Global Services,  
19 Inc., C 09-00537 MHP, 2009 WL 2084154, at \*4 (N.D. Cal. July 13,  
20 2009). This rule serves to prevent every breach of a contract from  
21 giving rise to tort liability and the threat of punitive damages:  
22 "Quite simply, the economic loss rule prevents the law of contract  
23 and the law of tort from dissolving one into the other." Robinson  
24 Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 988 (Cal. 2004)  
25 (internal quotation marks and brackets omitted). California has  
26 historically distinguished tort and contract law based on each body  
27 of law's purpose and remedies. See Hunter v. Up-Right, Inc., 6  
28 Cal. 4th 1174, 1180 (Cal. 1993). "Whereas contract actions are

1 created to enforce the intentions of the parties to the agreement,  
2 tort law is primarily designed to vindicate 'social policy.'" Foley v. Interactive Data Corp., 47 Cal. 3d 654, 683 (Cal. 1988)  
3 (citing William Prosser, Law of Torts 613 (4th ed. 1971)).

4  
5 Limiting recovery to contract damages makes it easier for  
6 parties to "estimate in advance the financial risks of their  
7 enterprise." Freeman & Mills, Inc. v. Belcher Oil Co., 11 Cal. 4th  
8 85, 106 (Cal. 1995) (quoting Applied Equip. Corp. v. Litton Saudi  
9 Arabia Ltd., 7 Cal. 4th 503, 515 (Cal. 1994)). As a result, the  
10 rule is particularly applicable when a party alleges "commercial  
11 activities that negligently or inadvertently [went] awry."  
12 Robinson Helicopter, 34 Cal. 4th at 991 n.7. However, the economic  
13 loss rule can still bar fraud and other intentional tort liability  
14 if those claims do not arise independently of the breach of  
15 contract claims. See id. at 990.

16 Defendant contends, as it did in its briefs on the first  
17 complaint, that the T&C establishes that payments are due on a pay-  
18 per-click basis, and that such charges would be determined based  
19 only on Defendant's technology with disputes governed by  
20 Defendant's reconciliation system. Reply at 5. As Defendant  
21 describes the contract, these dispute-resolution provisions plus  
22 the T&C's limitation of liability clause prove that the parties  
23 specifically allocated the risk for click fraud, whatever its  
24 source. Therefore, Defendant maintains that Plaintiff's FAC's  
25 intentional tort claims fail for the same reason they did in the  
26 February 28 Order: they are based on the same allegations of breach  
27 of contract via illegitimate pay-per-click charges, and Defendant  
28 could not have assumed any duties related to click fraud that did

1 not arise from the parties' contract. Id. at 5. Accordingly,  
2 Defendant concludes that all of Plaintiff's tort claims, including  
3 fraudulent concealment, are barred by the economic loss doctrine.  
4 Id. at 5-6.

5 In its February 28 Order, the Court held that "any duties  
6 Defendant owed to Plaintiff apart from the general duty to act  
7 reasonably arose at the moment of contract formation." Feb. 28  
8 Order at 10 (citing Robinson Helicopter, 34 Cal. 4th at 991. This  
9 holding was based on the fact that Plaintiff's original complaint's  
10 tort claims were based on Plaintiff's having been charged for  
11 "illegitimate" third-party clicks to which Defendant was either  
12 willfully blind or negligent in preventing.

13 Plaintiff's FAC, as opposed to its original complaint,  
14 explains Plaintiff's view of the difference between (1) contract  
15 and tort claims based on illegitimate clicks charged under the T&C  
16 due to Defendant's insufficient prevention of, or willful blindness  
17 to, fraudulent clicks, which the T&C anticipated and for which it  
18 allocated risk; and (2) tort claims based on the Defendant's  
19 alleged manipulation of its own advertising technology system to  
20 charge Plaintiff for fraudulent clicks and to direct fraudulent  
21 traffic through Plaintiff's Google ads, coupled with Defendant's  
22 alleged fraudulent concealment of its misdoings. This requires the  
23 Court to examine Plaintiff's allegations more closely than either  
24 party's brief seems to anticipate.

25 **i. Fraudulent Concealment**

26 Plaintiff alleges that Defendant alone knew the truth about  
27 its "bogus" websites and click-fraud bots. FAC ¶¶ 22-30.  
28 Plaintiff further states that it would not have entered the T&C had

1 it known the truth about Defendant's operation. Id. ¶¶ 30, 50-51.  
 2 Plaintiff's fraudulent concealment theory is essentially that  
 3 Defendant induced Plaintiff to enter the contract, see id. ¶ 22-30,  
 4 but then hid the fact that it was charging Plaintiff for worthless  
 5 clicks that would never convert to legitimate ad clicks on  
 6 Plaintiff's Google ads.<sup>2</sup>

7 To establish a claim for fraudulent concealment, a plaintiff  
 8 must allege that: (1) the defendant concealed or suppressed a  
 9 material fact, (2) the defendant was under a duty to disclose the  
 10 fact to the plaintiff, (3) the defendant intentionally concealed or  
 11 suppressed the fact with the intent to defraud the plaintiff, (4)  
 12 the plaintiff was unaware of the fact and would not have acted as  
 13 she did if she had known of the concealed or suppressed fact, and  
 14 (5) as a result of the concealment or suppression of the fact, the  
 15 plaintiff sustained damage. Hahn v. Mirda, 147 Cal. App. 4th 740,  
 16 748 (Cal. Ct. App. 2007). "In all averments of fraud or mistake,  
 17 the circumstances constituting fraud or mistake shall be stated  
 18 with particularity." Fed. R. Civ. P. 9(b). A complaint meets this  
 19 standard if it alleges "the time, place, and content of the alleged  
 20 fraudulent misrepresentation or omission; the identity of the  
 21 person engaged in the fraud; and 'the circumstances indicating

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22  
 23 <sup>2</sup> Defendant asserts that Plaintiff was engaged in "click arbitrage"  
 24 with its Google AdSense program. See MTD at 8 n.2. That is,  
 25 Plaintiff was purportedly paying Defendant to send traffic to  
 26 Plaintiff's sites, after which at least some of that traffic would  
 27 click through to ads Plaintiff published through Google AdSense.  
 28 See id. Supposing that the AdSense revenue Plaintiff obtained was  
 greater than what it paid to Defendant for traffic, Plaintiff could  
 be said to have "arbitraged" clicks. If that were the case, the  
 alleged click-fraud traffic for which it paid would not be so  
 worthless (at least until Google detected the click fraud and  
 docked Plaintiff's account). This is a factual inquiry that the  
 Court cannot evaluate in this Order.

1 falseness' of 'the manner in which [the] representations [or  
2 omissions] were false and misleading.'" Genna v. Digital Link  
3 Corp., 25 F. Supp. 2d 1032, 1038 (N.D. Cal. 1997) (brackets in  
4 original) (quoting In re GlenFed Sec. Litig., 42 F.3d 1541, 1547-58  
5 n.7 (9th Cir. 1994)).

6 The Court finds that Plaintiff's fraudulent concealment claims  
7 are barred by the economic loss rule. Plaintiff's fraud claim, as  
8 pled, is based on Defendant's charging Plaintiff for fraudulent  
9 clicks (either produced or merely permitted by Defendant) and  
10 Defendant's operation of sham websites. FAC ¶¶ 49-54. This is  
11 exactly what Plaintiff pled as to its breach of contract claims,  
12 but with the addition of fraudulent intent and concealment:

13 "[Defendant] has breached the Agreement by generating and billing  
14 [Plaintiff] for illegitimate 'click-fraud' traffic in addition to  
15 clicks that may have been initiated by legitimate prospective  
16 customers." Id. ¶ 42 (stating Plaintiff's breach of contract  
17 claim). "In the absence of an independent tort, punitive damages  
18 may not be awarded for breach of contract 'even where the  
19 defendant's conduct in breaching the contract was wilful,  
20 fraudulent, or malicious.'" Applied Equip. Corp., 7 Cal. 4th at  
21 516 (quoting Myers Bdlg. Indus., Ltd. v. Interface Tech., Inc., 13  
22 Cal. App. 4th 949, 959 (Cal. Ct. App. 1993)).

23 Further, to the extent that Plaintiff asserts that its  
24 fraudulent concealment claim should be interpreted as a fraudulent  
25 inducement claim, see Opp'n at 5, the Court finds that Plaintiff's  
26 FAC fails to meet Rule 9(b)'s heightened pleading requirements.  
27 The FAC fails to explain with requisite specificity how Plaintiff  
28

1 relied on any of Defendant's misrepresentations or omissions at the  
2 time the parties entered the T&C.

3 Plaintiff's fraudulent concealment claim is accordingly  
4 DISMISSED with leave to amend. If Plaintiff re-pleads this cause  
5 of action, it must explain how it is distinct from its breach of  
6 contract claims. To the extent that Plaintiff must alter its  
7 breach of contract claims to explain how the tort and contract  
8 claims are independent, it may do so. Plaintiff also has leave to  
9 amend its fraudulent concealment claim to plead it as a claim for  
10 fraudulent inducement. Regardless of the choice Plaintiff makes,  
11 it must meet the heightened requirements of Rule 9(b).

12 **ii. Negligent and Intentional Interference with**  
13 **Contractual and Potential Economic Relations**

14 The parties do not brief any issue concerning Plaintiff's  
15 negligent and intentional interference claims -- intentional  
16 interference with contractual relations, and negligent and  
17 intentional interference with prospective economic advantage --  
18 except to the extent that Defendant claims they are all precluded  
19 under the economic loss rule. The gist of these claims, as  
20 amended, is that Defendant knew of Plaintiff's relationship with  
21 Google, but directed fraudulent traffic to Plaintiff's websites  
22 knowing that it would result in deductions from Plaintiff's AdSense  
23 account and possible damage to Plaintiff's professional  
24 relationship with Google. As explained below, the Court finds that  
25 these claims survive the economic loss rule because they do not  
26 seek only to recover Plaintiff's contractual expectations from  
27 Defendant. They arise entirely independently of the T&C.

28

1 To plead a claim for intentional interference with contractual  
2 relations, a plaintiff must allege the following elements: (1) the  
3 existence of a valid contract between the plaintiff and a third  
4 party; (2) the defendant's knowledge of that contract; (3) the  
5 defendant's intentional acts designed to induce a breach or  
6 disruption of the contractual relationship; (4) actual breach or  
7 disruption of the contractual relationship; and (5) resulting  
8 damage. Reeves v. Hanlon, 33 Cal. 4th 1140, 1148 (Cal. 2004).

9 The elements of the intentional interference with prospective  
10 economic advantage tort are similar: (1) an economic relationship  
11 between the plaintiff and some third party, with the probability of  
12 future economic benefit to the plaintiff; (2) the defendant's  
13 knowledge of the relationship; (3) intentional acts on the part of  
14 the defendant designed to disrupt the relationship; (4) actual  
15 disruption of the relationship; and (5) economic harm to the  
16 plaintiff proximately caused by the acts of the defendant. Korea  
17 Supply Co. v. Lockheed Martin Co., 29 Cal. 4th 1134, 1153 (Cal.  
18 2003). The only different element in a negligent interference with  
19 prospective economic advantage claim is that the plaintiff must  
20 allege that the defendant owed a special or general duty of care.  
21 J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 803-04 (Cal. 1979).

22 As an additional pleading requirement, California Supreme  
23 Court has explained that the torts of negligent and intentional  
24 interference with prospective economic advantage additionally  
25 require plaintiffs to prove that "[d]efendant not only knowingly  
26 interfered with the plaintiff's expectancy, but engaged in conduct  
27 that was wrongful by some legal measure other than the fact of  
28



1 interference itself."<sup>3</sup> Della Penna v. Toyota Motor Sales, USA,  
2 Inc., 11 Cal. 4th 376, 393 (Cal. 1995). In explaining the meaning  
3 of "wrongful acts," that decision upheld the plaintiff's jury  
4 instruction which defined "wrongful acts" as conduct "outside the  
5 realm of legitimate business transactions" and that "[w]rongfulness  
6 may lie in the method used or by virtue of an improper motive."  
7 Id. at 380 n.1 (Mosk, J., concurring). The point of this  
8 requirement is to distinguish actionable "interference" with  
9 prospective economic relationships from non-actionable competitive  
10 conduct. See id. at 392 (Mosk, J., concurring).

11 The Court finds that Plaintiff's claims for intentional  
12 interference with contractual and prospective economic relations  
13 are sufficiently independent of Plaintiff's breach of contract  
14 claim. They avoid being barred by either the economic loss rule or  
15 Della Penna's requirement that a plaintiff plead "wrongful acts."

16 Plaintiff has pled that it had existing contractual relations  
17 and prospective economic relations with Google, and that Defendant  
18 knew it but intentionally directed click-fraud traffic through  
19 Plaintiff's websites toward Plaintiff's Google AdSense ads.  
20 Concerning the disrupted relationships, Plaintiff alleges that it  
21 lost money due to Google's click-fraud deductions, such that its  
22 performance under its contract with Google became more expensive,  
23 and also that its future relationship with Google was jeopardized  
24 and has still not recovered. Plaintiff also alleges specific  
25 monetary losses related to Defendant's conduct. As a pleading  
26

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27 <sup>3</sup> This holding also applies to the tort of intentional interference  
28 with prospective contractual relations, but Plaintiff only pled  
intentional interference with existing contractual relations.

1 matter, Plaintiff's FAC states claims for intentional interference  
2 with contractual and prospective economic relations.

3 As to Defendant's argument that Plaintiff's intentional  
4 interference claims are barred by the economic loss rule, the Court  
5 finds that Plaintiff's intentional interference claims are based on  
6 the click-fraud traffic that Defendant purportedly directed onto  
7 Plaintiff's own sites and through the Google AdSense ads that  
8 Plaintiff published. These factual differences can serve as the  
9 bases for torts even absent a contractual relationship between  
10 Plaintiff and Defendant, such that they are independent of  
11 Plaintiff's breach of contract claim, thereby avoiding the economic  
12 loss rule's bar. See Erlich v. Menezes, 21 Cal. 4th 543, 551 (Cal.  
13 1999) (explaining that in cases finding tort damages appropriate  
14 when a breach of contract concerning the same activity is also  
15 alleged, "the duty that gives rise to tort liability is either  
16 completely independent of the contract or arises from conduct which  
17 is both intentional and intended to cause harm"). Plaintiff's  
18 breach of contract claim is legally and analytically distinct from  
19 Plaintiff's intentional interference claims, which are independent  
20 of the parties' obligations under the T&C and were intended to  
21 cause harm. Id.

22 The Court also finds that, as to Plaintiff's intentional  
23 interference with prospective economic advantage claim, Plaintiff  
24 has sufficiently pled that the wrongful conduct on which it bases  
25 its intentional interference claim is distinct from the  
26 interference itself. See Della Penna, 11 Cal. 4th at 392-93.  
27 Plaintiff alleged that Defendant's generation and direction of  
28 click-fraud traffic through Plaintiff's websites to the AdSense-

1 hosted ads was both malicious and commercially useless, since those  
2 actions only served to enrich Defendant while depriving both  
3 Plaintiff and Google of useful commerce. See FAC ¶¶ 22-30.  
4 Further, the underlying "interference" is essentially based on  
5 Plaintiff's fraud claim, which is barred by the economic loss rule  
6 but is otherwise adequate to indicate that Defendant's behavior is  
7 based on unlawful conduct. See Korea Supply, 29 Cal. 4th at 1158  
8 (explaining that an "independently wrongful" act must be proscribed  
9 by, among other things, some common law or other determinable legal  
10 standard). Plaintiff's allegations satisfy the "improper motive"  
11 and "outside the realm of legitimate business transactions" tests  
12 for wrongful acts as explained in Della Penna.

13 The Court therefore finds that Plaintiff's intentional  
14 interference claims survive Defendant's motion to dismiss based on  
15 the economic loss rule, to the extent that they are based on  
16 Defendant's direction of click-fraud traffic past Plaintiff's ads  
17 on Defendant's own site toward the Google AdSense ads that  
18 Plaintiff hosted. Defendant's motion to dismiss those claims is  
19 DENIED. The Court notes that, given the economic loss rule and the  
20 structure of the pay-per-click ad market in general, this is a  
21 narrow ruling, supported by Plaintiff's specific allegations in  
22 this case. Whether Plaintiff can prove its claims will be the  
23 subject of a different motion.

24 Plaintiff's negligent interference with prospective economic  
25 advantage is somewhat different from the above torts, as it  
26 requires Plaintiff to plead that Defendant owed it a duty of care.  
27 It did so, albeit in a conclusory fashion, FAC ¶ 59, but Defendant  
28 did not challenge it on pleading grounds. Defendant only raised a

1 general motion to dismiss as to the economic loss rule, and  
2 Plaintiff did not further explain its allegations in its opposition  
3 brief. Even so, given California's general reticence to grant  
4 purely economic relief for negligence claims in breach of contract  
5 cases, see Erlich, 21 Cal. 4th at 553-54, and Plaintiff's failure  
6 to explain how this general duty is different from Defendant's  
7 contractual duties, the Court DISMISSES Plaintiff's negligent  
8 interference with prospective economic advantage claim. See id.  
9 (instructing courts faced with issues like this one to focus on  
10 intentional conduct rather than permit every negligent breach to  
11 give rise to tort damages).

12 Since Plaintiff has already had leave to amend its negligent  
13 interference with prospective economic advantage claim, and it has  
14 not indicated that further amendment would cure the defect, the  
15 Court finds that amendment would be futile. Dismissal is therefore  
16 WITH PREJUDICE.

17 **iii. UCL Claims**

18 The UCL prohibits unfair competition, including "any unlawful,  
19 unfair or fraudulent business act." Cal. Bus. & Prof. Code §  
20 17200. "Because [section 17200] is written in the disjunctive, it  
21 establishes three varieties of unfair competition -- acts or  
22 practices which are unlawful, or unfair, or fraudulent." Berryman  
23 v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1554 (Cal. Ct.  
24 App. 2007).

25 Defendant did not specifically move to dismiss Plaintiff's UCL  
26 claim in this round of briefing, nor did Plaintiff specifically  
27 defend its allegations, despite the UCL claim's apparently  
28 conclusory pleading. In its February 28 Order, the Court dismissed

1 Plaintiff's UCL claims to the extent that they were predicated on  
2 claims barred by the economic loss rule. To the extent Plaintiff's  
3 UCL claims are based on Plaintiff's intentional interference or  
4 breach of contract claims, they survive at this stage. To the  
5 extent they are based on Plaintiff's claims precluded by the  
6 economic loss rule, they are DISMISSED WITH LEAVE TO AMEND. If  
7 Plaintiff chooses to amend either its UCL claims or claims that it  
8 contends are the predicates to its UCL claims, Plaintiff must  
9 account both for the amendment guidelines provided above and the  
10 fact that the UCL's three-part structure commends specific  
11 allegations as to each prong.

12 **C. Limitation of Liability**

13 With at least a few of the FAC's intentional tort claims no  
14 longer precluded, the Court must revisit the effect of the T&C's  
15 limitation of liability clause. In the February 28 Order, the  
16 Court held that for breach of contract or negligence claims,  
17 Plaintiff's damages would be capped by the T&C's limitation of  
18 liability clause, and that the parties had agreed to limit any  
19 potential damages to direct contractual damages. Now the situation  
20 is different. The relevant contractual language reads:

21 (I) Under no circumstances will either party be  
22 liable to the other party, whether in contract,  
23 tort or otherwise, for indirect, incidental,  
24 consequential, special or exemplary damages (even  
25 if such damages are foreseeable and whether or  
not the indemnified party has been advised of the  
possibility of such damages) arising from this  
agreement; and

26 ///

27 ///

28 ///

1 (II) Neither party will be liable to the other party  
2 for more than the total amount paid or payable  
3 (plus applicable fees and costs) to [Defendant]  
4 under this Agreement.

5 T&C § 8.

6 Plaintiff argues that the limitation of liability clause is  
7 precluded as to Plaintiff's intentional tort claims under  
8 California Civil Code section 1668. Opp'n at 6. Section 1668  
9 reads: "All contracts which have for their object, directly or  
10 indirectly, to exempt anyone from responsibility for his own fraud,  
11 or willful injury to the person or property of another, or  
12 violation of law, whether willful or negligent, are against the  
13 policy of the law." Since all but one of the disputed claims  
14 (negligent interference) is an intentional tort, Plaintiff claims  
15 that Defendant's position renders Section 8 invalidated to the  
16 extent that Defendant seeks to use it to limit liability for future  
17 intentional torts. Id. at 6-7.

18 Defendant's reply suggests that regardless of which tort  
19 claims survived, Plaintiff's damages would be limited to the amount  
20 paid under the contract per the T&C's limitation of liability  
21 clause. Reply at 6. That would have been true on the claims that  
22 survived the February 28 Order -- both breach of contract claims --  
23 and would also be true for negligence torts, but it is not  
24 necessarily true for all intentional torts, as discussed below.  
25 The Court's holding on this issue from the February 28 Order was  
26 made specifically in the context of the economic loss rule's  
27 barring Plaintiff's blended tort-contract claims.

28 The Court finds that section 1668 renders the T&C's limitation  
of liability unenforceable to the extent that it would insulate

1 Defendant from intentional tort liability. "[Contractual] releases  
2 of future liability for fraud and other intentional wrongs are  
3 invariably invalidated." Farnham v. Super. Ct., 60 Cal. App. 4th  
4 69, 71 (Cal. Ct. App. 1997); see also McQuirk v. Donnelley, 189  
5 F.3d 793, 796 (9th Cir. 1999) (quoting the rule from Farnham).  
6 Defendant's only response to Plaintiff's citation of this rule is  
7 to refer to the February 28 Order, which, as noted above, addressed  
8 these claims under a different posture. Defendant does not  
9 otherwise address section 1668. The Court finds nothing in the  
10 pleadings or briefs that would override the conclusion that section  
11 1668 invalidates the T&C's limitation of liability as it concerns  
12 Plaintiff's intentional interference claims. However, the  
13 limitation still applies to Plaintiff's breach of contract claims,  
14 as Plaintiff concedes. Opp'n at 7 & n.1.

15 Defendant's motion to dismiss based on the T&C's limitation of  
16 liability clause is accordingly DENIED IN PART. The T&C's  
17 limitation of liability does not extend to Plaintiff's intentional  
18 interference torts. Since Defendant's alternative motion for  
19 partial summary judgment is based on the same arguments, that  
20 motion is DENIED. Defendant failed to carry its burden to show  
21 that there is no genuine issue of material fact concerning the  
22 application of the limitation of liability clause to Plaintiff's  
23 claims.

24 ///

25 ///

26 ///

27 ///

28 ///

1     **V.   CONCLUSION**

2           As explained above, Defendant LookSmart Ltd.'s motion to  
3     dismiss Plaintiff WeBoost Media S.R.L.'s first amended complaint is  
4     GRANTED in part and DENIED in part. Its motion for partial summary  
5     judgment is DENIED.

6           Plaintiff has leave to amend its fraud claims (and, if  
7     necessary, its contract claims) either to explain how its  
8     fraudulent concealment theory avoids being barred by the economic  
9     loss rule, to reframe its fraud theory in terms of fraudulent  
10    inducement, or both. Plaintiff also has leave to amend its UCL  
11    claim to the extent it is dismissed as vague or based on dismissed  
12    predicate claims.

13          If Plaintiff chooses to amend its pleadings, it must do so  
14    within thirty days of this Order's signature date, or the deficient  
15    claims may be dismissed with prejudice.

16  
17           IT IS SO ORDERED.

18  
19           Dated: June 12, 2014



UNITED STATES DISTRICT JUDGE